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Winner of the Council of Europe Human Rights Prize

CAJ's submission to the

Joint Committee on Human Rights Inquiry into Human Rights and Deaths in custody

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include prisons, policing, emergency laws, the criminal justice system, the use of lethal force, children's rights, gender equality, racism, religious discrimination and advocacy for a Bill of Rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Introduction

CAJ have been active on the issue of inquests for many years. Our focus has predominantly related to deaths caused by the security forces or where there have been allegations of collusion but we have also provided advice and assistance to others.

The starting point for our critique of the system has been the extent to which it does not conform to international human rights standards, both the European Convention on Human Rights, the International Covenant on Civil and Political Rights and other "soft law" international standards. In the mid and late 1990s we were approached by a number of families who had just completed their inquests and were at a loss as to how to proceed. We advised them to take their cases to the European Court of Human Rights arguing that the UK had violated the procedural aspect of article 2 of the Convention guaranteeing an adequate ex post facto investigation of a killing involving the state. We lodged the cases in Strasbourg and acted as lawyers for the families before the Court, culminating in the successful judgements of Kelly et al v UK, Shanaghan v UK and more latterly McShane v UK.

The cumulative effect of these judgements in our view obliges the UK government to completely overhaul the way in which these cases are investigated should occur in future. The judgements are of course not restricted to the issue of inquests. They involve the police, the DPP, and the police complaints system. However, it is equally clear that major change must occur within the coronial system in Northern Ireland in order to ensure that it complies with article 2, which of course is now domestic legislation by way of the Human Rights Act.

In this context we were disappointed to see no mention of Northern Ireland in the Call for Evidence from the Joint Committee. While the Inquiry relates to deaths in custody we believe that any such inquiry should also look to deaths caused by the state, particularly in the context of the adequacy of investigations. Our comments relate primarily to the procedural aspect of article 2 and while they are grounded in the experience of Northern Ireland, we believe they have relevance for England and Wales.

It is also of course the case that there have been and continue to be prison deaths in Northern Ireland. Inquests, which we have observed into a number of these deaths, suggest that prison authorities in Northern Ireland are no better equipped at dealing with vulnerable prisoner than their counterparts in Britain.

Interpretation Of The Right To Life Provisions

In the cases of *Kelly v United Kingdom*[1], *Shanaghan v United Kingdom*[2], *Jordan v United Kingdom*[3] and *Mocker v United Kingdom*,[4]the European Court of Human Rights took the opportunity to clarify the exact parameters and criterion required for an investigation to comply with Article 2 of the Convention.

In the 'landmark judgment[s]'[5] the Court made specific reference to various provisions of UN 'soft law'[6] and in summary concluded that the UK had breached Article 2 on the procedural ground on the basis of the:

> Lack of independence of the police investigation, which applies to police killings (Jordan, Mocker), army killings (Kelly), and cases of alleged collusion (Shanaghan).
> The refusal of the DPP to give reasons for failing to prosecute.
> Lack of compellability of witnesses suspected of causing death.
> Lack of verdicts at the inquest.
> Absence of legal aid and non-disclosure of witness statements at the inquest.
> Lack of promptness in the inquest proceedings.
> The limited scope of the inquest.
> Lack of prompt or effective investigation of the allegations of collusion.

In addition to this:

> What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures[7]

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[1] Kelly v UK, Application No.30054/96, Judgement of 4 May 2001
[2] Shanaghan v UK, Application No. 37715/97, Judgement of 4 May 2001
[3] Jordan v UK, Paragraph 95, Application No. 24746/94, Judgement of 4 May 2001
[4] Mocker v UK, Application No. 28883/95, Judgement of 4 May 2001
[5] Amnesty International News Report, AI Index EUR 45/010/2001. See also comments of Nuala O'Loan (Irish Times October 11 2001 Page 8) this judgement 'will be the greatest challenge to most existing police complaints system[s] in Europe'. 'Recent events in London, with the Lawrence case, and in Ireland, with the Abbeylara case, have shown that there isa demand for openness, transparency and independence in the investigation of allegations of misconduct by the police. I believe this can lead to an enhanced police service'
[6] See Kelly v UK, Application No.30054/96, Judgement of 4 May 2001. Reference was made to The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles) (adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders) Paragraph 21, 22. United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65), Paragraph 9, 10-17. The "Minnesota Protocol" (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions), Section B "Purposes of an inquiry".
[7] Kelly v UK, Paragraph 94,Application No.30054/96, Judgement of 4 May 2001. See also Ilhan v. Turkey, Paragraph 63, . ECHR 2000-VII, Judgement of 27 June 2000

The next-of-kin must be adequately involved in the investigative proceedings also 'to the extent that it safeguards his or her legitimate interests [8]. Ineffective securing of evidence will hamper the establishment of the cause of death or the person responsible and, thus, would constitute a breach of article 2[9].

Scope Of The Inquest

The purpose of an Inquest is to inquire into unexpected, unexplained or suspicious death so that the facts may be ascertained and the public assured that any necessary action by the authorities is promptly taken to ensure that similar avoidable deaths do not occur in the future.[10]

Rule 15 of the 1963 Rules sets out the precise ambit of the Inquest[11]:

> The proceedings and evidence at the inquest shall be directed solely to ascertaining the following matters, namely:
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> (a) who the deceased was;
> (b) how, when and where the deceased came by his death;
> (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death.

It would appear on a cursory reading of the foregoing, that the scope for determination of the circumstances surrounding a death is quite broad. However, Rule 15 has been greatly constrained by two factors.

Firstly, Rule 15 is subject to the provisions of Rule 16 which provides that:

> Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing rule

Secondly, the construction of the word 'how' has been construed in a very narrow form by the judiciary, to exclude the possibility of a true appraisal of the question.

In the Northern Ireland Courts in *In Re: Bradley and Larkens Application*[12] Justice Carswell stated:

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[8] Güleç v. Turkey, Paragraphs 82, Reports 1998-IV, Judgment of 27 July 1998 (where the father of the victim was not informed of the decisions not to prosecute);); Ögur v. Turkey, Paragraphs 92, Application No. 21954/93, ECHR 1999-III,

[9] Salman v. Turkey, Paragraph 106, ECHR 2000-VII, Judgement of 27 June 2000, Tanrikulu v. Turkey, Paragraph 109, ECHR 199-I, Judgement of 8 July 1999

[10] See British Irish Rights Watch, *Current Developments in Inquests in Britain and Ireland: Record of Proceedings,* (June 1992)

[11] The equivalent English provisions are S.11(5) of the *Coroners Act 1988* and Rule 84, *Coroners (Practice and Procedure) Rules 1988*

> The word 'how' means 'by what means' rather than 'in what broad circumstances'. The enquiry must focus on matters directly causative of death...It should not embark on a wider inquiry relating to the background circumstances of the death; it is not its function to provide the answers to all the questions, which the next of kin may wish to raise.

Thus, it is apparent from the foregoing cases that a full consideration of the broad circumstances in which the deceased came by his/her death is firmly held to be not within the competence of the Coroners Court[13].

In the decision of *Shanaghan v United Kingdom*[14], the Court specifically criticised the fact that the scope of the examination of the Inquest excluded the family's concern of alleged collusion by security force personnel in the targeting and killing of Patrick Shanaghan:

> The domestic courts appeared to take the view that the only matter of concern to the inquest was the question of who pulled the trigger, and that, as it was not disputed that Patrick Shanaghan was the target of loyalist gunmen, there was no basis for extending the enquiry any further into issues of collusion. Serious and legitimate concerns of the family and the public were therefore not addressed by the inquest proceedings.

In case of *Mocker v United Kingdom*[15]:

> Serious concerns arose from these three incidents as to whether police counter-terrorism procedures involved an excessive use of force, whether deliberately or as an inevitable by-product of the tactics that were used. The deliberate concealment of evidence also cast doubts on the effectiveness of investigations in uncovering what had occurred.

Therefore, the Court concluded that, notwithstanding the existence of a criminal trial running parallel with the Inquest, Article 2 may require a wider consideration of the possibility of excessive use of force by the security forces. The Court went beyond the dicta of the domestic Courts by looking to the underlying objective of the inquest, that of re-assuring the public and the members of the family as to the lawfulness of the killings. It concluded that due to the fact such a purpose had not been accomplished by the criminal trial, the positive obligations inherent in Article 2 required an adequate procedure whereby such doubts could be addressed[16].

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[12] [1994] N.I. 279. See also Hutton LCJ in *Re Ministry of Defence's Application*, [1994] N.I. 279, 307, Simon Brown LJ in *R v HM Coroner for Western District of East Sussex, ex p Homber* (1994) 158 JP 357,369

[13] Thus in the *Mocker* case the judge held that the Coroner was not entitled to attempt to ally allegations of a 'shoot to kill' policy by examining the 'broad circumstances' in which the deceased had met their deaths (unreported QBD (Crown Side), 11 July 1994).

[14] Paragraph 111, Application No. 37715/97, Judgment of 4 May 2001

[15] Paragraph 137, Application No. 28883/95, Judgement of 4 May 2001.

[16] Id.

In cases like that of *McCann v United Kingdom*[17] it is clear that issues relating to the planning and control of the operation which leads to the death must be included within the scope of the inquest. Indeed, the Coroner for Belfast in the Jordan case has now accepted, as a matter of principle that such matters lie within the proper scope of the inquest[18].

The investigation must focus upon (a) not only those who were allegedly directly responsible for the death, but (b) the planning and organisation of the state agency or operation that provided the context in which the deaths took place and any systemic deficiencies therein[19] Where appropriate it must also indicate those who were responsible[20]

Adjournment/ Delay

Great concern has been expressed over the inordinate delays in the commencement of Inquest proceedings in Northern Ireland[21]. This is particularly disturbing in cases involving allegations of systemic deficiencies which remain unaddressed for such a long period of time.

The Coroner must decide whether or not to hold an inquiry without delay and the inquiry must be held 'as soon as practicable' after the coroner has been notified of the death[22].

As a matter of practice, inquests in Northern Ireland do not commence, until the Coroner is informed by the police or the DPP, that they may open proceedings. This practice effectively nullifies the applicability of the provisions of the Coroners Rule in that the Coroner is powerless to control the timing of the Inquest. This has a significant effect on the efficiency and promptness of the process.

By way of contrast, in England the inquest is opened and then readjourned[23] where criminal prosecution is imminent. In this way, the Inquest will be in advance of ultimate decision on prosecution. The British practice reflects the underlying purpose

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[17] Series A no. 324, Judgment of 27 September 1995

[18] See Treacy, Seamus, *Article 2 and the Future of Inquests in Northern Ireland: A Practitioner's Perspective,* (Transcript from CAJ and British Irish Rights Watch, Inquest Seminar dated 23 February 2002)

[19] *Andronicou and Constantinou v Cyprus*, Reports 1997- VI, *McCann and Others v. the United Kingdom*, Series A no. 324, Judgment of 27 September 1995

[20] *Jordan v United Kingdom*, Application No. 24746/94, Judgement of 4 May 2001, *Ögur v. Turkey*, Paragraph 88, Judgement of 20 May 1999, Application no. 21594/93

[21] For example, The *Mocker* Inquest was not opened for 6 years and was adjourned in 1988 pending appeal. English practice has also been subject to such criticism. See also British Irish Rights Watch, *Current Developments in Inquests in Britain and Ireland: Record of Proceedings,* (June 1992) which alleges that the average delay in Inquest proceedings is 10 years.

[22] *Coroners (Practice and Procedure) (Northern Ireland) Rules* 1963, Rule 3. In England and Wales this requirement is under Coroners Act 1988, s. 8(1)

[23] *Coroners (Practice and Procedure) Rules 1988.*

of the rules by making it clear that the Coroner is in control and the police can be summonsed to give account for themselves if there is an unreasonable delay.

Whereupon a criminal charge is brought on account of the death, the Inquest in Northern Ireland is postponed until the conclusion of all criminal proceedings, including appeal[24]. In contrast, In England and Wales, adjournment is only until the conclusion of the trial.

In the decision of *Jordan v United Kingdom*[25], the Court stated at Paragraph 108 that:

> A requirement of promptness and reasonable expedition is implicit in this context (see the Yasa v. Turkey judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, §§ 102-104; *Cakici v. Turkey* cited above, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, [Section I] ECHR 2000-III, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

In this decision the Court also refer to Paragraph 9 of the *United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*[26] which states *inter alia* that:

> There shall be a thorough, *prompt* and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ..(emphasis added)

In *Shanaghan v United Kingdom*[27] the Court were highly critical of the delay in the proceedings:

> The inquest opened on 26 March 1996, more than four and a half years after Patrick Shanaghan's death. The Government explained that the delay in the RUC sending the file to the Coroner on 14 January 1994 resulted from their heavy criminal workload. The Court does not find this a satisfactory explanation for failure to carry out a transfer of documents for an important judicial procedure. No explanation, beyond unspecified further enquiries, has been forthcoming for the delay after the transfer of the file. Once the inquest opened, it proceeded without delay, concluding within a month. In the

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[24] *Coroners (Northern Ireland) Act 1959,* Section 13(1) and (6)

[25] Application No. 24746/94, Judgement of 4 May 2001. See also *Kelly v United Kingdom,* Application No.30054/96, Judgement of 4 May 2001, Paragraph 97, *Mocker v United Kingdom*, Paragraph 114 Application No. 28883/95, Judgement of 4 May 2001*Yasa v. Turkey*, Paragraphs 102-104, Reports 1998-IV, Judgment of 2 September 1998, *Çakici v. Turkey*, Paragraphs 80, 87, ECHR 1999- IV,, *Tanrikulu v. Turkey*, Paragraph 109, ECHR 1999-I, Judgement of 8 July 1999, *Kaya v. Turkey*, Paragraph 106-107, ECHR 2000-III.

[26] Adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65

[27] Paragraph 119-120, Application No. *37715/97*, Judgment of 4 May 2001

circumstances, the delay in commencing the inquest cannot be regarded as compatible with the State's obligation under Article 2 of the Convention to ensure that investigations into suspicious deaths are carried out promptly.

Compellability

Rule 9(2) of the *Coroners (Practice and Procedure) Rules 1963*[28] is an exception to the general rule that all persons who are competent to give evidence at an inquest are compellable to do so. Under this rule a person 'suspected of causing the death or has been charged or is likely to be charged with an offence related to the does not have to appear."[29]

The position in Northern Ireland with regard to the non-compellability of key witnesses was specifically criticised in the decision of *Jordan v United Kingdom*[30] at Paragraph 127:

> In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence (Rule 9(2) of the 1963 Coroners Rules, see paragraph 68 above). In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in this case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigating police officers were made available to the Coroner instead (see paragraphs 19 and 20 above). This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. *It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention* (see also paragraph 10 of the United Nations Principles on Extra-Legal Executions cited at paragraph 90 above).

The Court also makes reference to the 'soft law' UN United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions[31], Principle 10 of which states that:

> The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry ... shall also

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[28] Rule 9(2) has since been repealed by the Lord Chancellor

[29] The formulation of this Rule is in line with the recommendations of theBrodrick Committee which recommended that 'where a person is suspected of causing the death he should not be called and put on oath unless he so desires and should not be cross examined'. It is noteworthy that this recommendation was not followed with regard to the Coroner's practice in England and Wales.

[30] Application No. 24746/94, Judgement of 4 May 2001

[31] Adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65

have the authority to oblige officials allegedly involved in any such executions to appear and testify.

Rule 9(2) was subjected to similar criticism in the case of *Mocker v United Kingdom*[32] and *Kelly v United Kingdom*[33]. In the domestic case of *In Re: Jordans Application*[34], Mocker J. at Page 6, stated that 'the decision clearly called for the removal of the exemption in Rule 9(2), therefore'.

In light of the European Court of Human Rights, the Lord Chancellor has since amended Rule 9. The amended Rule 9 reads as follows:

> 9(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse
>
> 9(2) Where it appears to the coroner that a witness has been asked such a question, the Coroner shall inform the witness that he may refuse to answer the question

As is apparent from above, the old rule pertaining to the privilege against self-incrimination, which had always functioned adequately in England and Wales to protect the rights of the potential accused, have been retained. While we welcome the changes in relation to non-compellability, we are concerned that the continued existence of the right against self-incrimination will undermine the changes in that police officers and soldiers will refuse to answer any questions relating to the actual killings or indeed the planning of the security operation which led to the deaths.

We believe there are alternative ways in which the rights of soldiers and police officers can be protected while still ensuring the integrity of the fact finding nature of the inquest. For instance, soldiers giving evidence to the Saville inquiry have been guaranteed that their evidence will not be used against them in any subsequent trials. We believe that this approach could be adopted in relation to article 2 inquests.

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[32] Paragraph 144. Application No. 28883/95, Judgement of 4 May 2001. Sergeant M and officers B and R were therefore not subject to examination concerning their account of events. Their statements were made available to the Coroner instead. This did not enable any satisfactory assessment to be made of either their reliability or credibility on crucial factual issues

[33] Paragraph 121, Application No.30054/96, Judgement of 4 May 2001. 'At the inquest in this case, none of the soldiers A to X appeared. They have therefore not been subject to examination concerning their account of events. The records of their statements taken in interviews with investigating police officers were made available to the Coroner instead (see paragraphs 16 to 23 above). This does not enable any satisfactory assessment to be made of either their reliability or credibility on crucial factual issues'.

[34] As yet unreported. See Justice Kerr, *Article 2 and the Future of Inquests in Northern Ireland,* (Transcript from CAJ and British Irish Rights Watch, Inquest Seminar dated 23 February 2002)

Independence Of The Investigation

In both a domestic and European context the need for independence of investigation has been addressed and the need highlighted[35]. In the cases of and *Guluc v Turkey*[36] and *Ögur v. Turkey*[37], it was stated that:

> For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.

This means not only a lack of hierarchical or institutional connection but also a practical independence.[38]

This creates two problems in terms of article 2 compliance in Northern Ireland. First, it is clear that the police cannot carry out investigations into killings for which police officers were, or were suspected of being responsible. The creation of the Police Ombudsman goes some way to solving this problem. However in light of the Kelly judgement, it is also clear that the police cannot investigate army killings. The Police Ombudsman does not resolve this problem because her powers are limited to the police. She has no power to investigate the army. This applies equally to the situation regarding deaths in prison. In our view it is clear that investigations by the prison service will in no way satisfy the independence requirement of article 2. It is also our view that a police investigation will similarly fall foul of article 2 requirements.

Second, Coroners have in the past and continue to rely on the police investigation to obtain relevant evidence. Under Section 11(1) of the *Coroners (Northern Ireland) Act 1959* the Coroner is charged with making 'such investigations as may be required to enable him to determine whether or not an inquest is necessary'. The police act on behalf of the Coroner to obtain relevant evidence. In theory, the coroner may instruct the police, however,

> It may not be appropriate for the Coroner to give such instructions where, for example, the death is the subject of a murder inquiry. Coroners are usually content not to interfere in any criminal investigation of that type, and to rely

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[35] See also *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Principle 23 'persons affected by the use of force or firearms or their legal representatives shall 'have access to an independent process, including a judicial process' and *Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Execution,*. Principle 11 'an investigation must be independent and not governed by interests of any agency whose actions are the subject of the scrutiny'

[36] Judgment of 27 July 1998, Reports 1998-IV, Paragraph 81-82;

[37] Application No. 21954/93, ECHR 1999-III, Paragraph 91-92

[38] See for example the case *of Ergi v. Turkey,* Judgment of 28 July 1998, *Reports* 1998-IV, Paragraph 83-84 where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident

instead on the senior investigating officer advising on the progress being made by the police[39]

In the case of *Ergi v. Turkey*[40] a violation of Article 2 was found where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident. Thus, excessive reliance on the police or other government bodies during an investigation may result in a finding of a breach of the State's Article 2 obligations.

It is therefore clear that the Coroner can no longer rely on the police to conduct investigations in these cases.

Verdicts

In England and Wales verdicts are available to Coroners and inquest juries. These include the possibility of an unlawful killing verdict and a range of other possible verdicts.

Northern Ireland was curtailed in this regard in 1981 when the verdict was abolished and replaced with 'findings'. Therefore it is not open to a jury in Northern Ireland to bring a verdict of 'unlawful killing' in the case of a death by a member of the security forces[41].

Rule 15 of the 1963 Rules pertaining to Northern Ireland sets out the precise ambit of the Inquest:

> The proceedings and evidence at the inquest shall be directed solely to ascertaining the following matters, namely:
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> (d) who the deceased was;
> (e) how, when and where the deceased came by his death;
> (f) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death.

In the Northern Ireland Courts in *In Re: Bradley and Larkens Application*[42] Justice Carswell stated:

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[39] Leckie & Greer in CORONER'S LAW AND PRACTICE IN NORTHERN IRELAND 90 (Northern Ireland: SLS Legal Publications) (1998)

[40] Paragraph 83-84, Judgment of 28 July 1998, *Reports* 1998-IV,

[41] The Gibraltar Inquest into the deaths of Mairead Farell, Daniel McCann and Sean Savage was at liberty to return such a verdict in light of the fact that the Inquest was conducted in Gibraltar under Gibraltar Law.

[42] [1994] N.I. 279. See also Hutton LCJ in *Re Ministry of Defence's Application*, [1994] N.I. 279, 307, Simon Brown LJ in *R v HM Coroner for Western District of East Sussex, ex p Homber* (1994) 158 JP 357,369

> The word 'how' means 'by what means' rather than 'in what broad circumstances'. The enquiry must focus on matters directly causative of death...It should not embark on a wider inquiry relating to the background circumstances of the death; it is not its function to provide the answers to all the questions which the next of kin may wish to raise...I am of the opinion that what was contemplated by the word 'findings' in the 1980 Rules was just such a brief encapsulation of the essential facts, and that juries should be encouraged to confine their findings to statements of that nature.

European Jurisprudence

The European Court of Human Rights has specifically indicated that an investigation of the violation of the right to life must have the capacity to make findings indicating those responsible. In *Kelly v United Kingdom*[43], the Court stated at Paragraph 96 that:

> The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. Kaya v. Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible

Notwithstanding that the European Court specifically condemned the inquest procedure for not permitting any verdict or findings the government and the Lord Chancellor have failed to amend the Rules to enable a Coroner or his jury to bring a verdict.

Public Interest Immunity Certificates

Public Interest Immunity Certificates were specifically criticised in the case of Mocker v United Kingdom[44]in which the Court stated that

> [t]he Reports in any event dealt with the evidence of obstruction of justice, which was relevant to the wider issues thrown up by the case. The Court finds that the inquest was prevented thereby from reviewing potentially relevant material and was therefore unable to fulfil any useful function in carrying out an effective investigation of matters arising since the criminal trial.

The fundamental issue at hand here is, essentially, the balancing of a set of competing interests both in the name of the public good; on one hand that of national security and on the other hand, the need for full disclosure of evidence to support the proper

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[43] Application No.30054/96, Judgement of 4 May 2001. See also *Jordan v UK,* Paragraph 107, Application No. 24746/94, Judgement of 4 May 2001, *Mocker v United Kingdom,* Paragraph 113, Application No. 28883/95, Judgement of 4 May 2001, *Ögur v. Turkey*, Paragraph 88, Judgement of 20 May 1999, Application no. 21594/93

[44]Paragraph 151, Application No. 28883/95, Judgement of 4 May 2001. Public Interest Immunity Certificates were also referred to the in the case of *Shanaghan v United Kingdom,* Application No. 37715/97, Judgment of 4 May 2001 at Paragraph 118. However, because no certificate was issued in this case, the Court concluded that '[t]here is therefore no basis for finding that the useof these certificates prevented examination of any circumstances relevant to the death of the applicant's son'.

administration of justice. It would appear, all too often, that the scales have tipped too far the one way, i.e. national security. It does not serve the public interest when documents, which may be relevant to revealing some systemic deficiencies within the police force, are purposively withheld from determination at Inquest.

In its "package of measures" which it submitted to the Committee of Ministers in Strasbourg in response to the judgements the UK government argued the judge in relevant cases (and presumably the Coroner in inquests) should decide on what should be subject to the PII where the Minister was unsure. In recent hearings in Northern Ireland however lawyers for the police and army have refused to disclose unredacted documents to the Coroner. This in our view is simply unacceptable.

The balance should be in favour of disclosure. In the event that a PII is issued or being considered the situation in relation to Coroners should be the same as obtains in criminal cases under the judgement of *ex parte Wiley.*

International Soft Law Standards

The relevant 'soft law' standards applicable to the area of Inquest systems, particularly with regard to controversial deaths at the hands of security forces, are contained in the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*[45] and the *United Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*[46] and the *UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*[47]. The standards contained therein are not strictly legally binding. However, they represent an important yardstick by which a State may judge its adherence to the generally recognised principles applicable in the conduct of an investigation into a suspicious death.

These principles were specifically referred to and given credence by the European Court of Human Rights in the recent cases of *Jordan v United Kingdom*[48], *Mocker v United Kingdom*[49] ,*Kelly v United Kingdom*[50]: and *Shanaghan v United Kingdom*[51]. This would certainly add weight to the binding force of these principles, in light of the fact that they have been applied through the mechanism of the European Court.

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[45] Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.
[46] Adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65,
[47] United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, U.N. Doc. ST/CSDHA/12, U.N. Sales No. 91.IV.1 (1991). The 'UN Manual' provides model methods of investigation, purposes, and procedures of an inquiry and processing of the evidence. (Chapter III, 16), requires that all investigations be characterized by competence, thoroughness, promptness, and impartiality, (Chapter III, 16), the scope of the inquiry, the terms of reference should be framed neutrally to avoid suggesting a predetermined outcome, (Chapter III, 18). In cases involving an allegation of government involvement, the Minnesota Protocol recommends the establishment of a commission of inquiry (Chapter III, 21/22), Such commissions require extensive publicity, public hearings, and the involvement of the victims' families, (Chapter III, 21)
[48] Paragraph 87-92, Application No. 24746/94, Judgement of 4 May 2001
[49] Paragraph 144, Application No. 28883/95, Judgement of 4 May 2001
[50] Paragraph 121, Application No.30054/96, Judgement of 4 May 2001
[51] Application No. 37715/97, Judgment of 4 May 2001

Conclusion

The judgements from the European Court of Human Rights in May 2001 marked a watershed in the development of article 2 jurisprudence in Europe. In Northern Ireland we believe they should mark the effective demise of the discredited manner in which deaths caused by the state are investigated. A new independent and effective mechanism to inquire into article 2 deaths is required.

We believe the most effective way of dealing with such cases in the future may well be the creation of a single entity to investigate such cases. It appears to us that, drawing on some of the thinking done by the Luce Review team, a new level of coronial court might be established to deal with controversial cases while either the old system or a more streamlined administrative model might deal with the less controversial cases. Obviously there would need to be safeguards built into the system to ensure decisions as to which level a particular case has been directed to could be subject to appeal. This new higher level of court could, in our view, be tasked with investigating controversial deaths from the beginning, working in tandem with the family and if necessary external investigators, and also ultimately with the DPP. Powers and resources could be allocated accordingly. Public hearings would remain a central aspect of the investigation of these cases.

One further matter also needs to be addressed which is the failure of the DPP to provide reasons in article 2 cases. In our view and in the view of the European Court of Human Rights such cases are "crying out for an explanation" of the failure to prosecute.

That specific criticism and the others made by the Court in the European judgements need to be met in full.

> The investigations into article 2 killings need to be independent, carried out either by the Police Ombudsman, another independent investigator for army killings or investigators appointed by the Coroner.
> The DPP need to give reasons for failing to prosecute in article 2 cases.
> Witnesses suspected of causing death must be compellable and the right against self-incrimination needs to be addressed in order to ensure the integrity of the hearing.
> Verdicts must be possible at inquests.
> Legal aid must be available and witness statements must be made available in advance of the hearing.
> Inquest hearings must be held promptly.
> The scope of the inquest must be such as to allow a broad inquiry into the circumstances surrounding the death.
> If PIIs are to be used they should be narrowly drawn and should apply in inquest courts as they do in ordinary criminal courts.